Sand and Gravel General Permit

Response to Comments

List of Commenters

Molly A. Lawrence, for unspecified members of the sand and gravel industry (S&G Operators)
Christopher Ott (Ott)
Larry Petersen (Petersen)
Carolyn and Rile Pickett (Pickett)
Washington Aggregate and Concrete Association (WACA)

The following comments are paraphrased from the original comment letters and testimony. The original public comment letters and a transcript of public hearing testimony can be viewed at Ecology's website:

Special Condition S2—Monitoring Requirements and Effluent Limitations Matrix

pH monitoring for facilities with SIC Codes 3272 and 3273

Comment 1: WACA appreciates the prompt efforts by the Department of Ecology to implement the settlement of the 2005 permit appeals and this opportunity to comment on the modifications. In accordance with the settlement, Ecology agreed to provide some justification in the fact sheet addendum for increasing the frequency of monitoring for Type 3 stormwater at concrete manufacturing facilities operating under SIC Codes 3272 and 3273. The explanation provided in the fact sheet is not satisfactory to WACA and substantiates the view of the association that the increase in monitoring frequency is arbitrary, capricious, and is not based on substantial evidence.

As an initial matter, Ecology has not appropriately distinguished the difference between process water from manufacturing concrete and surface water runoff from areas outside a facility. Furthermore, it appears the primary justification for the increased monitoring frequency is the reduction of monitoring at facilities operating under other SIC codes covered by the general permit. Another justification stated in the fact sheet is the statement that industrial stormwater can be more variable in terms of volume and concentration than process water. Missing from the analysis is any evidence or data that justifies the increased monitoring frequency. (WACA)

Response: During the public comment period on the draft Sand and Gravel General Permit (Permit), several pH-related public comments were submitted to Ecology which resulted in a review of pH monitoring requirements across the entire industry. The Permit covers discharges from a wide range of facilities and Standard Industrial Classification (SIC) codes. Some SIC codes include industrial activity which modifies the pH of stormwater and process water (e.g., concrete stormwater and process water) while other SIC codes do not modify pH (e.g., gravel pits). The discussion below summarizes the rationale for the pH monitoring frequency for the SIC codes covered under the Permit. Since the industrial activities associated with sand and gravel mining do not typically have the potential to modify the pH of stormwater, the pH limitations and monitoring requirements for stormwater discharges from Construction Sand and Gravel (SIC 1442) facilities were dropped; this applied to stormwater discharges to both surface water and ground water. Since process water and mine dewatering discharges are included in EPA's Federal Effluent Limitation Guidelines for the Mineral Mining and Processing Point Source Category (40 CFR Part 436), the pH limitations and monitoring requirements for process water (gravel wash water, etc.) and mine dewatering discharges had to be retained. However, since the data collected during the previous permit cycle indicated a high level of compliance with the pH limit, the pH monitoring frequency for SIC 1442 process water and mine dewatering water was reduced to once per quarter which is adequate to detect any pH problems that may be seasonal.

The pH monitoring frequency for other related SIC codes (e.g., SIC 1429 Crushed and Broken Stone, etc.) with a low risk of modifying pH of surface or ground water were also decreased from monthly to quarterly.

The revised permit increased the frequency of pH monitoring for Concrete Type 3 Stormwater (SIC 3272, 3273) discharges to ground water from quarterly to monthly. Ecology has determined that the increased monitoring frequency of pH at sites that manufacture concrete is justified due to the potential for the stormwater that comes into contact with onsite materials to adversely impact surface water or ground water quality. The determination to increase the monitoring frequency from quarterly to monthly is based on best professional judgment. Federal and state regulations give Ecology broad discretion to determine appropriate monitoring frequencies. 40 CFR 122.44(i)(4) states that a monitoring program be established on a case by case basis and that monitoring be conducted and reported at least once per year. WAC 173-226-090(b) requires monitoring to be conducted "at intervals sufficiently frequent to yield data which reasonably characterizes the nature of the discharge of the monitored effluent flow or pollutant." Subsection d of the regulation goes on to state "Variable effluent flows and pollutant levels may be monitored at more frequent intervals than relatively constant effluent flows and pollutant levels which may be monitored at less frequent intervals." Although stormwater discharges are not generally considered effluent flows, the intent of the language is clear: the regulations specify minimum monitoring frequencies, but otherwise give Ecology discretion to set the frequency in a permit. In setting the monthly monitoring frequency for pH, Ecology considered that stormwater discharges are highly variable both in terms of flow and pollutant concentrations, and the relationships between discharges and water quality can be complex. An industry-specific data analysis is not necessary to substantiate that stormwater is more variable than process wastewater. Ecology also considered the environmental significance of pH; and the cost of monitoring relative to the benefits obtained. Specifically, pH is a simple, inexpensive, on-site test that can detect and prevent discharges that can cause violations of state water quality standards.

The modified final permit also includes new language which allows for the reduction in the pH monitoring frequency from monthly to one time per quarter for discharges to ground. This reduction in monitoring frequency would be available to facilities which are able to demonstrate continuous compliance with the permit for a period of 18 months.

Comment 2: The commenter disagree with Ecology's determination to reduce pH monitoring for many of activities covered by the permit and eliminate pH monitoring for sand and gravel mines (SIC Code 1442). The commenter request that the pH monitoring frequency for all permitted facilities be increased to a daily frequency. The basis of the request is to enhance protection of ground water quality. (Pickett)

Response: In setting the monthly monitoring frequency for pH, Ecology considered included the environmental significance of pH; and the cost of monitoring relative to the benefits obtained. Specifically, pH is a simple, inexpensive, on-site test that can detect and prevent discharges that can cause violations of state water quality standards. Ecology has determined that requiring daily sampling for pH would be excessively onerous relative to the environmental benefits obtained.

Special Condition S6.F—Reporting and Recordkeeping Requirements: Access to Plans

Ecology received two substantive comments concerning the regulatory status of, and access to, a permittee's Stormwater Pollution Prevention Plan (SWPPP).

Regulatory Status of SWPPPs

Comment 3: The purposed general permit attempts to transform individual operators' SWPPPs into public documents. Ecology needs to take responsibility for ensuring the adequacy of these plans by reviewing and approving them. Without Ecology's review and approval, even non-substantive differences could result in litigation in which third parties assert not so much that a particular SWPPP does not meet the performance standards established in the permit, but that the operator could do so differently or better. We request that Ecology delete proposed condition S6.F from the permit or substantially modify it before issuing the final general permit. (S&G Operators)

Response: SWPPPs are an important element of the sand and gravel general permit and as such are public documents, as stated in section 3.4 of the fact sheet associated with the draft Multi-Sector General Permit. The permit will not be revised to require SWPPP submittal and approval by Ecology. This decision is based on the following: 1) plans are available onsite and are reviewed during compliance inspections, 2) the permit has a mechanism to require permittees to submit their plans to Ecology, if necessary, 3) to ensure that AKART is applied to all discharges, the permit requires all SWPPPs and BMPs to be developed in accordance with Ecology-approved Stormwater Management Manuals, or other equivalent manuals or BMPs, and 4) Ecology does not have the resources or space to actively track or store SWPPPs for 1,000-plus facilities. Since SWPPPs are intended to be 'living' documents that change over time, access to the most current version is critical in assessing compliance with the permit. Given the limited resources available, and the absence of a regulatory requirement to formally approve SWPPPs, Ecology has determined the requirements in the proposed permit are appropriate.

Public Access to SWPPPs

Comment 4: This requirement [to provide public access to SWPPPs] improperly shifts the regulatory burden for implementing the general permit from Ecology to the permittee. It would be one thing if Ecology required operators to provide copies of their SWPPPs to Ecology, and then Ecology could respond directly to third party requests for these plans. However, this permit condition attempts to make the permittees subject to the state's public disclosure laws, despite the fact that those laws were never intended to apply to private citizens, but rather only to public entities. (S&G Operators)

The fact sheet erroneously states that a copy of a SWPPP must be provided to the public when requested in writing. Contrary to this statement, a permitted facility may elect to direct any public request to the Department of Ecology. What is the legal basis for compelling a private party to respond to a public request for a SWPPP?

Why does the permit fail to include some provision to advise facilities that they have the right to claim confidentiality? If the facility claims confidentiality over any portion of its SWPPP, will it have to have that claim resolved by Ecology before withholding the SWPPP?

What education efforts will Ecology undertake to advise members of the public that they should not seek to enter an industrial facility without permission? (WACA)

Response: A SWPPP is a comprehensive plan developed by the permittee to assure compliance with the permit. When all elements of a properly developed SWPPP are fully implemented and maintained, the SWPPP provides a technology-based standard of performance that should represent both the best available pollutant control and all known available and reasonable methods of prevention and control. For these reasons, the SWPPP is incorporated into the permit by reference and is considered by state and federal authorities as a public document. The requirements of Special Condition S6.F are based on the conditions of EPA's Multi-Sector General Permit issued in 2000.

Concerning the comment that the permittee must respond to a public request for its SWPPP, section S6.F(2)(b) of the modified permit allows the permittee to submit a copy of its SWPPP to Ecology for review by the requestor.

Requiring permittees retain the most current version of their SWPPP on site and making it available upon request was determined by Ecology to be less onerous on permittees than requiring a current SWPPP be submitted to Ecology. A permittee's SWPPP is a living document and should be updated as site conditions change, which at active sites could be daily or weekly. Rather than routinely requiring updated SWPPPs be submitted to Ecology on the unlikely chance that a member of the public might request it, Ecology has instead provide that current SWPPPs be maintained on-site. Under the current permit language permittees always have the option of submitting the most current SWPPP to Ecology for viewing by the public.

Regarding the question about education efforts to prevent unpermitted entry (trespass) to industrial facilities, Ecology does not believe that the proposed permit suggests that the public has a right to enter facilities without permission. Ecology does not intent to spend our limited education and outreach funding on this issue.

<u>Special Condition S7—Water Management</u>

Pit to Pier Operations

Comment 5: This section of the permit should include explicitly address pit to pier operations. The permit should prohibit the direct discharge of any process waters derived from the conveyor belt system that originates at a sand and gravel site to the pier and loading the material on to barges. Any process waters discharged to surface water should meet the water quality standards. In reviewing the proposed permit, I see this operational method of transporting sand and gravel to barges is not addressed. (Petersen)

Response: The commenter is correct that process wastewater discharged from a conveyor belt system is not explicitly regulated in the permit. However, the permit contains several general requirements that are expected to assure compliance with the state's surface water and ground water quality standards. All discharges from the permittee's facility are required to comply with: 1) the effluent limitations and monitoring requirements in Special Condition S2 for sand and gravel operations, 2) comply with the surface water and ground water quality standards, specified in Special Condition S3, and 3) comply with the additional monitoring requirements specified in Special Condition S4. In addition, Special Condition S7.H requires that any ditch, channel or other system used for routing water be designed, constructed and maintained to contain all flows. Finally, Special Condition S8 requires the proper operation and maintenance of all facilities and systems to achieve compliance with the permit. Specifically, S4.B requires the permittee to prevent spills from facilities or systems that can result in a discharge of pollutants to waters of the state. Ecology is confident that these permit provisions are adequate to address the commenter's concerns.

Special Condition S10.D—Erosion and Sediment Control Inspections

Comment 6: The commenter pointed out an inconsistency between the draft permit and the Western Washington Stormwater Manual concerning the level of certification required to conduct an erosion and sediment control inspection. At sites where annual inspections are impracticable, the permit requires a Registered Professional Engineer, Licensed Professional Geologist, or Certified Professional in Erosion and Sediment Control to certify every three years that the facility is in compliance with the general permit. However, the manual allows a person with a lesser credential, a Certified Erosion and Sediment Control Lead, to conduct the inspection. (Ott)

Response: Certified Erosion and Sediment Control Lead (CESCL) certification is different than a Certified Professional in Erosion and Sediment Control (CPESC). Individuals with CESCL certification (BMP C160) have been trained to install, inspect and maintain BMPs on construction sites, with an emphasis on compliance with the Construction Stormwater General Permit. CPESC certification is a much higher degree of professional expertise; similar to that of a Registered Professional Engineer or Licensed Professional Geologist. For this three year compliance inspection, Ecology proposes to allow Registered Professional Engineers, Registered Geologists, and individuals with CPESC certification to perform the inspection, but not allow individuals with CESCL certification.